

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE  
(October 29, 1998 Session)

**FILED**  
June 30, 1999  
Cecil Crowson, Jr.  
Appellate Court  
Clerk

BRETT KILGORE	)	SULLIVAN
	)	CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Richard Ladd,
	)	Chancellor.
v.	)	
	)	No. 03S01-9805-CH-00047
TENNESSEE DISTRIBUTION,	)	
INC.,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Steven B. Johnson  
K. O. Herston  
Butler, Vines & Babb  
Knoxville, Tennessee

For Appellee:

Michael E. Large  
Bristol, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Associate Justice  
William H. Inman, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

## MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The appellant insists "the trial court abused his discretion when it allowed the plaintiff to re-open his proof after final judgment was entered against plaintiff." The appellee insists the "defendant has waived the issue it now presents for appellate review, due to the fact that defendant failed to make the appropriate objection at the trial court level." As discussed below, the panel has concluded the judgment should be affirmed.

On April 19, 1993, the employee or claimant, Kilgore, suffered a work related accidental injury at work. He filed a complaint averring he suffered from reflex sympathetic dystrophy syndrome because of the accident, seven requests for production of documents and twenty-four interrogatories in the Chancery Court for Sullivan County on November 23, 1993. On February 8, 1994, the employer filed its answer admitting the work related accident, but denying that the claimant's medical condition was causally connected to the accident.

On November 21, 1995, over two and one-half years after the accident, the claimant filed an amended complaint, averring the same thing, but also claiming an injury in September of 1992. On August 16, 1996, an order of readiness was entered setting the case for trial on October 16, 1996. Two days before scheduled trial date, the defendant answered the amended complaint by asserting that the claim was time barred to the extent that the plaintiff was seeking benefits for the September, 1992 injury.

The case was actually tried on November 16, 1996. The chancellor found that the 1992 claim was time barred, that the plaintiff had failed to establish that he suffered a compensable work related permanent injury in the 1993 accident, but that he was temporarily and totally disabled from May 19, 1993 to September 7, 1993 and that he would retain a permanent partial disability of fifteen percent to the body as a whole. The last two findings were contingent

upon reversal on appeal. From the record, briefs and arguments, it appears the chancellor was less than satisfied with the plaintiff's medical proof of causation.

The plaintiff filed a timely Tenn. R. Civ. P. 59 motion seeking a new trial based on newly discovered evidence, supported by an affidavit from the treating physician that he had failed to testify as to a causal connection between the plaintiff's permanent impairment and the 1993 work related accident because of a misplaced office note. The motion was granted and the plaintiff allowed to present the doctor's corrected testimony. The employer contends it was an abuse of discretion.

In Freeman v. VF Corp., 675 S.W.2d 710 (Tenn. 1984), a workers' compensation case in which a trial judge refused to grant a new trial on the basis of newly discovered evidence, where the physician had reevaluated the injured worker and changed his opinion, our Supreme Court affirmed the trial court, but made the following observation:

We are not holding, if a trial judge should be moved by such "newly discovered evidence" to grant a new trial while the case remained in the bosom of the court as in the instant case, that it would be error, but we do hold that his failure to do so does not constitute reversible error....  
Id at 712.

Moreover, it appears from the record that the reopening of the proof by the chancellor served justice, rather than permitting injustice. Thus, we have concluded the chancellor did not abuse his discretion under the present circumstances. The question of whether the defendant waived its objection is therefore moot.

The judgment of the trial court is affirmed and the case remanded to the Chancery Court for Sullivan County. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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Adolpho A. Birch, Jr., Associate Justice

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William H. Inman, Senior Judge

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BRETT KILGORE, ) SULLIVAN CHANCERY  
)  
) No. 13-263(L)  
Plaintiff-Appellee, )  
)  
) No. 03S01-9805-CH-00047  
v. )  
)  
)  
TENNESSEE DISTRIBUTION,. ) Richard Ladd  
INC. ) Chancellor  
)  
Defendant-appellant. )

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the Appellant, Tennessee Distribution, Inc. and Steven B. Johnson, surety, for which execution may issue if necessary.

06/30/99